No. 86-421

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, et al.,

Appellants,

v.

ROTARY CLUB OF DUARTE, et al.,

Appellees.

On Appeal From the Court of Appeal
of the State of California
Second Appellate District

# BRIEF OF THE CITY OF NEW YORK AND THE NEW YORK CITY COMMISSION ON THE STATUS OF WOMEN AS AMICI CURIAE IN SUPPORT OF APPELLEES ROTARY CLUB OF DUARTE, ET AL.

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## Interest of the Amici

The City of New York and the New York City Commission on the Status of Women (the "Commission"), established by Mayor Edward I. Koch to make recommendations for legislative and executive action to eliminate discrimination against women in the City, submit this brief as amici curiae in support of Appellees Rotary Club of Duarte, et al.

New York City (the "City") and the Commission have an interest in the affirmance of the judgment below because a City law is currently being challenged in New York State and Federal court on similar constitutional grounds as the California statute at issue in this case. While Local Law 63 differs from the Unruh Civil Rights Act (the "Unruh Act"), both statutes seek to give women and minorities equal access to publicly available goods, services, and

accommodations. In addition, amici have an interest in apprising this Court that a case cited in Appellants' brief concerning the New York State Human Rights Law has no precedential value.

The Judgment Below

The Unruh Act prohibits discrimination based on sex, race, color, religion, ancestry, or national origin in "[a]commendations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51. The California Court of Appeals, Second Appellate District, determined that both Appellant Rotary International and Appellee Rotary Club of Duarte are "business establishments" under the Unruh Act; the court concluded that Rotary International had impermissibly revoked the charter of the Duarte club for

admitting three women in violation of its standard Rotary club constitution. The appellate court then directed the trial court to enter a judgment reinstating the Duarte club's charter and enjoining Rotary International from enforcing its male-only membership restriction on the Duarte club. (App. C-29, 39-40.)[1]

Local Law 63

The City Administrative Code prohibits invidious discrimination in a "place of accommodation" and specifically exempts "[a]ny institution, club or place of accommodation which proves that it is in its nature distinctly private." N.Y.C. Admin. Code §§ 8-107(2),-102(9). (The New York

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[1]"App." refers to Appellants' Appendix.

Executive Law contains the same prohibition. N.Y. Exec. Law §§ 292,296.)

Local Law 63 amended the Code by adding, among other things, criteria for determining when a place of accommodation is "distinctly private in nature." It provides in part as follows:

> [a]n institution, club or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, uses of space, facilities, services meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.

The rationale for these criteria is contained in the City Council's Legislative Declaration accompanying Local Law 63, which provides in part that:

> One barrier to the advancement of women and minorities in the business and professional life of the City is the discriminatory practices of certain membership organizations where business deals are often made and personal

> contacts valuable for business purposes, employment and professional advancement are formed.
>
> The Council recognizes the interest in private association asserted by club members. However, the Council finds that this interest does not overcome the public interest in equal opportunity... The Council finds that business activity often occurs at clubs having more than four hundred persons to discuss business. The dues and expenses of members at such organizations are often paid by their employers, because the employee's activities at the organization help to develop the employer's business. The organizations also rent their facilities through members for use as conference rooms for business meetings attended by nonmembers. Organizations where such practices occur provide benefits to business entities and persons other than members and thus are not in fact 'distinctly private' in their nature.

On October 9, 1984, the day that Local Law 63 went into effect, the New York State Club Association, Inc. (the "Club Association") brought a declaratory judgment action in State court to have the law declared unconstitutional. New York State

Club Association, Inc. v. City of New York, No. 25028/84 (N.Y.Sup.Ct., N.Y.Co.) On October 29, 1985, New York Supreme Court Judge Louis Grossman granted summary judgment in favor of the City and declared Local Law 63 to be constitutional and valid. (N.Y.L.J., October 31, 1985.) His opinion provides in part that:

> The clubs affected by this legislation must have a membership of over 400 individuals. Such number is not small, nor can it be viewed as exclusive. (See Roberts v. United States Jaycees, supra). Moreover, the statute requires that the clubs receive revenues from nonmembers for the purpose of a trade or business. This commercial activity generating revenue from outsiders further undermines the claim of exclusivity.
>
> * * *
>
> The inclusion of commercial activity as a criteria fits squarely within the concepts and guidelines laid down in Power Squadrons v. Appeal Board, supra and Roberts. The City statute, in prohibiting discriminatory practices, responds precisely to the substantive problems, which legitimately concerns it and abridges no more

> speech or associational freedom than is necessary to accomplish its purpose. (See City Council v. Taxpayers for Vincent, U.S. 104.

His decision was affirmed by the Appellate Division, First Department, on July 31, 1986, with one dissent, which concerned the exemptions in the law for benevolent orders. (N.Y.L.J., August 1, 1986.) The case is now before the New York Court of Appeals and was argued on January 5, 1987.

Enforcement of Local Law 63

In January 1986, after the Club Association's motions for a stay of enforcement of Local Law 63 were denied by the Supreme Court, the Appellate Division, and the Court of Appeals, the City Human Rights Commission filed complaints against three all-male clubs suspected of being in violation of the statute. In March 1986, two of these clubs brought separate actions against the City in the District Court for the

Southern District of New York to declare Local Law 63 unconstitutional. The University Club v. The City of New York, et al., 86 Civ. 2330 (GLG); The Union League Club v. The City of New York, et al., 86 Civ. 2343 (GLG). A decision on the City's motion to dismiss these actions is pending.

The third club, the Century Association, entered into a conciliation agreement with the City, pursuant to which it admitted excluding women from membership and from certain club facilities; the club also conceded that it is not "distinctly private" within the meaning of Local Law 63. The Century Association agreed to consider women as candidates for membership and to admit them according to the same procedures as men on the "Effective Date" of the agreement, defined as the later of a decision upholding the validity of Local Law 63 by

the Court of Appeals "and, if the case is carried there" by the United States Supreme Court, or, alternatively, a final disposition not invalidating Local Law 63 or its enforcement by the highest federal court considering the cases brought by the Union League Club and the University Club.

* * *

An affirmance by this Court of the judgment below should convince the challengers of Local Law 63 of the futility of their battle for constitutional protection of the right of all-male clubs, whose activities involve the participation of nonmembers for commercial purposes, to exclude women from membership and from equal access to club facilities.

## SUMMARY OF ARGUMENT

The court below properly found that Rotary International is a "business establishment" within the meaning of the Unruh Civil Rights Act, which violated that law by revoking the charter of the Rotary Club of Duarte for admitting women. Appellants' claim, that Rotary International's male-only membership policy is protected by the First Amendment, is based on a misconstruction of the record and reliance on a New York case which is no longer of precedential value. The record establishes that Rotary clubs are unlimited in size, that many employers underwrite Rotary club dues of their employees, and that club activities involve the regular participation of nonmembers of both sexes and have a

substantial commercial purpose. In addition, there is no evidence in the record that women members of Rotary clubs will have a detrimental effect on the organization's speech greater than necessary to accomplish California's compelling interest in eliminating discrimination against its female citizens. Thus, this case is squarely within this Court's holding in Roberts v. United States Jaycees, 468 U.S. 609 (1984), and Rotary International's discriminatory membership policy is not protected by either the First Amendment's freedom of intimate or expressive association.

The decision of the court below should be affirmed.

## ARGUMENT

### POINT I

**ROTARY CLUBS ARE LARGE ASSOCIATIONS OF BUSINESSMEN WHOSE ACTIVITIES INVOLVE THE REGULAR PARTICIPATION OF NONMEMBERS, INCLUDING WOMEN. THE COURT BELOW THEREFORE PROPERLY HELD THAT ROTARY INTERNATIONAL'S EXCLUSION OF WOMEN FROM ITS MEMBER CLUBS IS NOT ENTITLED TO THE PROTECTION OF THE FIRST AMENDMENT'S FREEDOM OF INTIMATE ASSOCIATION.**

The California Court of Appeals properly found, following this Court's decision in Roberts, 468 U.S. at 609, that the Unruh Act does not abridge Rotary International's freedom of intimate association. (App., C-35, C-38.) While Appellants acknowledge that Roberts is controlling (App. Br., 15, 18)[2], they contend that this authority gives Rotarians

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[2]"App. Br." refers to Appellants' Brief.

a First Amendment freedom to discriminate against women.

Because the size of an organization is a major factor in determining whether it should be constitutionally protected as an intimate association, Roberts, 468 U.S. at 620, Appellants depict local Rotary clubs as "generally small." (App. Br. 15.) The record demonstrates that this is not, in fact, the case. Significantly, there are more than three times as many Rotarians as there are Jaycees: 905,750 members of 19,788 Rotary clubs in 1982 (App. F-2), compared to 295,000 members of the Jaycees in 7,400 clubs in 1981. 468 U.S. at 609. There is no limit on the size of Rotary clubs (J. App., 35)[3], and some clubs have up to 900 members. According to club literature,

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[3]"J. App. refers to the Joint Appendix.

Rotarians are members of one great big Rotary club -- the "Rotary family." (J. App. 85). As Herbert A. Pigman, General Secretary of Rotary International testified, "[t]he fellowship is much broader than just the local fellowship. Rotary is a worldwide fellowship and, particularly as the world has developed in its communication, travel has increased dramatically, this is becoming an increasingly important dimension of the organization." (App. at G-44).

Appellants' description of membership in Rotary as selective is also misleading (App. Br. 21), since, like the Jaycees in Roberts, "[n]umerous nonmembers of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another...." 468 U.S. at 621. Rotary International encourages Rotarians to invite guests (such as their employees, competitors, and

customers) to weekly club meetings, and to give them copies of "Service is My Business," an official Rotary publication. (J. App. 25,39.) It is not uncommon for a Rotary club meeting to have guests "in the tens and twenties." (App. G-24.) Rotary clubs can also have joint meetings with other service clubs on specified occasions. (J. App. 39.) Prospective members of a club are often invited to several regular meetings before being asked to sign an application card. (J. App. 66.) Rotary clubs are urged to include non-Rotarians in club-sponsored panels, seminars, and conferences. (J. App. A-14, A-17, A-45.) Members are encouraged to invite students, who are not eligible to join Rotary, to club luncheons. (J. App. 66-67.) Indeed, the entire public is invited to attend meetings of new Rotary clubs -- an official press release about the formation of a new Rotary club

gives information about the location, date and time of the new club's regular weekly meeting. (J. App. 96-97.)

While women can be associate members of the Jaycees, Roberts, 468 U.S. at 613, Appellants assert that "[t]here are no official women's affiliates entitled to use the Rotary name or participate in the activities of Rotary International." (App. Br., 22.) However, Appellants' disingenuous attempt to distinguish Rotary from the Jaycees based on the participation of women must fail, since many women are unofficially involved with Rotary service activities, with Rotary International's blessing. (J. App. 44.) A statement of the Rotary International board of directors provides that:

> "Many Rotary clubs are privileged to have ladies committees or other associations composed of women relatives of Rotaries cooperating with and supporting them in service and other Rotary club activities. The board of directors encourages and

> commends such groups for the fine work which they perform." (J. App. 45.)

Rotary International also authorizes the women in these auxiliaries to wear the official Rotary emblem as a lapel button. (J. App. 68.)

In sum, the record establishes that Rotary clubs, like the Jaycees, are not highly personal organizations whose discriminatory membership policies should be accorded constitutional protection under the First Amendment's "freedom of intimate association."

## POINT II

**ROTARY INTERNATIONAL IS A LARGE COMMERCIAL ENTERPRISE AND ROTARY CLUBS ARE EXTENSIONS OF THE WORKPLACES OF THEIR MEMBERS. THE COURT BELOW THEREFORE PROPERLY HELD THAT ROTARY INTERNATIONAL'S EXCLUSION OF WOMEN FROM ITS MEMBER CLUBS IS NOT PROTECTED BY THE FIRST AMENDMENT'S FREEDOM OF EXPRESSIVE ASSOCIATION.**

Appellants' contention that the Unruh Act impermissibly infringes on Rotarians' "freedom of expressive association" was likewise rejected by the California Court of Appeals, in reliance upon Roberts. "To the extent that International's freedom of expressive association is involved," the court stated, "infringement of this right is clearly justified by the state's compelling interest in abolishing sex discrimination by business establishments." (App., C-37.)

The Court of Appeals concluded that Rotary International is a "business

establishment" under the Unruh Act after an examination of its corporate structure, particularly its Communications Division, which publishes hundreds of publications; its sources of revenue, which include license fees and royalties from commercial firms which manufacture and sell the official Rotary emblems; and from Rotary International's official directory, which includes a list of hotels owned and operated by Rotarians and firms licensed by Rotary International to manufacture and sell items with the official Rotary, Rotaract or Interact name and emblem. (App., C-16-22.)

The Rotary Club of Duarte was also classified by the court below as a "business establishment" based on evidence establishing that Rotary clubs function as an extension of the workplaces of their members. (App., C-22-27.) (That is literally true on club "Rotation Days," when the weekly meeting is

held at the workplace of a club member.) (J. App. 25.) The court below cited the testimony of three members of the Duarte club that they joined for the purpose of making contacts with community business leaders so that they could more effectively serve their employers. One paid his dues personally, deducting them as a business expense, while the dues of the other two were paid by their employers. (App., C-25-26.) The court also referred to the stipulated testimony of the treasurer of the Bakersfield, California Rotary club, that out of 200 members, 8 or 10 paid their dues personally, and the dues of the others were paid by their employers. (App., C-26.) On these facts, the Court of Appeals found that:

> This evidence leaves no doubt that business concerns are a motivating factor in joining local clubs. While Rotarians perform numerous and commendable charitable services at the local, national and international

> levels, the evidence establishes that there are business benefits enjoyed and capitalized upon by Rotarians and their businesses or employers.
>
> The evidence simply does not support the trial court's finding that these business advantages are merely incidental. By limiting membership in local clubs to business and professional leaders in the community, International has in effect provided a forum which encourages business relations to grow and which enhances the commercial advantages of its members. (App., C-26.).

Appellants ignore these facts, relying on the fiction that the majority of its members comply with Rotary International's official written policy against the commercialization of Rotary. (App. Br., 30-31.) Appellants then suggest that Rotary clubs are entitled to First Amendment protection even if some members use Rotary for business purposes and even if their dues are paid by their employers, citing Kiwanis Club of Great Neck v. Board of Trustees of Kiwanis International, 83 Misc.2d 1075 (Sup.

Ct., 1975), aff'd, 52 A.D.2d 906 (2d Dept', 1976), aff'd, 41 N.Y.2d 1034 (1977); cert. den., 434 U.S. 859 (1977). (App. Br., 31-32.) In that case, similar commercial activity by some members of a New York chapter of the Kiwanis was held not to render the club subject to the antidiscrimination provisions of the New York State Human Rights Law. 41 N.Y.2d 1034.

Over the past decade, however, New York courts have studiously ignored the Kiwanis Club of Great Neck case. Indeed, the Court of Appeals has referred to Kiwanis Club of Great Neck only once since 1977, in United States Power Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 413 (1983). That reference, moreover, was to the dissenting opinion of Judge Shapiro in the Appellate Division; he would have sustained plaintiffs' complaint under the State Human Rights Law on the ground that

by enacting that statute, the Legislature intended "[t]o encompass the right of self-employed professionals and persons engaged in business to have access, without discrimination based on sex, to groups or clubs other than those distinctly private in their nature and which give to the members additional potential sources of patronage or business." (Emphasis in original.) 52 A.D. 2d at 916-917.

It is clear that Kiwanis Club of Great Neck no longer has any precedential value, and would not be followed now in light of the Court of Appeals' more recent ruling in Power Squadrons. 59 N.Y.2d 401. The court explicitly held in that case that the State Human Rights Law applies to membership organizations which are "[n]ot in fact private except for purposes of discrimination." Among the factors which the Court of Appeals found relevant to

determining whether an organization should be considered a "distinctly private" club, and exempt from the law's prohibition against discrimination, include whether the club "[l]imits the use of the facilities and the services of the organization to members and bona fide guests of members," and whether it "[d]irects its publicity exclusively and only to members for their information and guidance." 59 N.Y.2d at 412-13.

It is obvious from the record in this case that Appellants encourage public participation of nonmembers in local Rotary club activities, which are substantially devoted to the improvement of business and professional skills, and actively promote Rotary clubs to the business community. (J. App., 14, 21, 39, 40, 41-42, 45, 59, 60, 64, 66, 78.) Thus, under Power Squadrons, 59 N.Y. 401, Rotary International's all-male membership policy would not be exempt from

the New York Human Rights Law's prohibition against invidious discrimination.

Appellants' "freedom of expressive association" argument is spurious in any event. There is no evidence whatsoever that admitting women to membership in Rotary will adversely affect the organization's speech. Indeed, when Mr. Pigman, Rotary International's General Secretary, was asked about the impact on Rotary of invalidating its all-male restriction, he responded: "[T]hey don't know... ." (App., G-53). As the California Court of Appeals properly found, Mr. Pigman's testimony "[d]oes not support a finding that the admission of women into the local Rotary Club of Duarte would cause the downfall of the District or International or seriously interfere with Rotary's objectives." (App., C-31.)

With no evidence to the contrary, it is not unreasonable to assume that women Rotarians may have a positive effect on the professed goals of Rotary clubs "[t]o provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." (App., 35.)

## CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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